BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

COMPENSATION FOR PROPERTY DESTROYED TO PREVENT SPREAD OF A CONFLAGRATION. — The destruction of buildings by explosives and bombardment to stop the advance of the fire at the San Francisco disaster raises the questions: (1) whether the owners have a claim for indemnity against the insurance companies under their contracts of insurance; and (2) whether there is an action against the municipality for contribution. These questions are systematically considered, and the authorities are exhaustively collected and synthesized in a recent article. *Compensation for Property Destroyed to Prevent Spread of a Conflagration*, by Henry C. Hall and John H. Wigmore, 1 Ill. L. Rev. 501 (March, 1907). In treating the question (1) of the liability of the insurer, Mr. Hall discusses (*a*) how far the ordinary provision of fire insurance policies, "for loss or damage by fire," includes a liability for property destroyed to prevent the spread of a fire, and (*b*) whether express exemption clauses against loss by explosion or by act of the city authorities negative indemnity. He concludes (*a*) that by "the elastic doctrine of 'proximate cause,'" the peril insured against need simply predominate among other causes which may be more direct as to time and place; and that, therefore, losses resulting from such preventive measures as are here in question are "losses by fire" for which the insurer is liable. And (*b*) on the same ground of insurance against the proximate cause of the loss, he inclines to hold the insurer liable for such losses even when the insurance contract contains exemption clauses. In both these cases a confusing rule of "proximate cause" has been established, under the influence of the practice [1] of construing contracts very harshly against the insurer, and by the desire to indemnify, not only for losses directly caused by fire, but for damages [2] resulting from *bona fide* attempts to extinguish it or to save property from burning. In applying this rule of proximate cause courts do not hesitate to find the causal relation between the fire and the loss, when the fire has given a thief [3] — an independent and intervening agent — the opportunity to steal the property insured. Yet courts refuse to regard as proximate results losses that come from a causal series physically perfect, as when windows [4] are broken by the concussion following an explosion caused by fire. A rule of causation that includes voluntary acts of human agents, but excludes ordinary physical effects of the peril insured against, seems objectionable.

"Loss or damage by fire" may mean simply losses caused by the process of burning and the direct physical results,[5] or it may include, in addition to results causally produced, certain losses occasioned by the peril of the "impending conflagration." Under the narrower rule, even with a limitation of liability to losses caused by burning, the insured would recover for property destroyed by the city, if the explosive used in destroying the property happened to be combustible,[6] like gunpowder. In such a case the fire causing the loss is the fire kindled to set off the explosive and the resulting combustion, not the fire raging in the neighborhood. The leading case [7] determining the liability of the insurer when explosives are used depends on this conception. But, as combustible explosives are not necessarily the means of destruction, the courts have sought a broader principle. They say "loss or damage by fire" should also include damages resulting from *bona fide* attempts [8] to extinguish the fire and to save

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[1] Nat'l Bank *v.* Ins. Co., 95 U. S. 673.
[2] Greenwald *v.* Ins. Co., 3 Phila. (Pa.) 323.
[3] Tilton *v.* Hamilton Fire Ins. Co., 1 Bosw. (U. S.) 367.
[4] Everett *v.* The London Assurance, 19 C. B. (N. S.) 126.
[5] Lynn, etc., Co. *v.* Meriden, etc., Co, 158 Mass. 570.
[6] Scripture *v.* Lowell, etc., Co, 10 Cush. (Mass.) 356.
[7] City Fire Ins. Co. *v.* Corlies, 21 Wend. (N. Y.) 367.
[8] White *v.* Republic Fire Ins. Co., 57 Me. 91.

the imperilled property. However desirable this broad interpretation may be, it includes voluntary acts of human beings acting, perhaps, under stress or duty, but still acting as free agents. It must depend, therefore, not on any theory of causation, but on a construction of the contract. This construction is possible because the insured is impliedly and often expressly [1] under the obligation of making all reasonable exertions to extinguish the fire and prevent avoidable consequences.[2] To extend such construction, however, to cover the case of property destroyed to prevent the spread of fire is far more difficult, for then the losses are incurred not for the benefit of the particular property insured.[3] Whether or not this result [4] is fair to the insurer, it is submitted that it can be reached consistently only by the broadest interpretation of the contract of insurance and not by the artificial rule of proximate cause.

Furthermore, under this theory the clauses — generally adopted and in the standard policies — excepting loss by explosion and loss caused by order of the city, etc., become very material. In spite of these clauses it is generally held,[5] at any rate when an explosion follows an "accidental fire," that the insurance company is not exempt from liability. In the same way the courts would probably disregard the second exception in case of property destroyed by the city to stop a conflagration. But, if the contract be interpreted, it would seem that these exceptions should be effective.[6]

The alternative question (2) of the right of the owner to recover from the municipality has almost always, in the absence of statute, been answered in the negative. The courts have based this result most soundly on the ground that the municipal corporation is strictly limited [7] by its charter, and they have only suggested the possibility of a quasi-contractual right. This right Mr. Wigmore strongly advocates. The most cogent analogy advanced in favor of his theory seems to be the doctrine of general average [8] in maritime law, under which every person whose property is preserved at the expense of another's is liable to contribution in proportion to the value of his share of the cargo. But the language of the only case [9] applying the suggested quasi-contractual doctrine under circumstances like the present, is "that those for whose supposed benefit the sacrifice is made should be liable." A "supposed benefit" seems too conjectural to found an action in implied *assumpsit*, and it is equally conjectural whether the city as a whole enjoyed the "supposed benefit." As the certainty of the benefit and of the party benefited, which are fundamentally requisite in the law of general average, are both lacking here, no action for quasi-contractual contribution should lie against the municipality. Instead, the remedy would seem to be legislation, in view of which the writers append the draft of an all-embracing statute.

CONDITIONS IN CONTRACTS. — The influence of the teachings of Professor Langdell and Professor Williston on the subject of conditions in contracts is evidenced by a recent article by Mr. George P. Costigan, Jr., who gives a summary of the questions. *Conditions in Contracts*, 7 Colum. L. Rev. 151 (March, 1907). The writer first defines the three classes of conditions, — express conditions, those implied in fact, and those implied in law. He indicates pointedly that while the first two classes are practically alike, the third differs greatly

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[1] Mass. Rev. L. 1902, c. 118, § 60.
[2] Brady *v.* N. W. Ins. Co., 11 Mich. 425.
[3] Cohn *v.* Nat'l Ins. Co., 96 Mo. App. 315, 319.
[4] The Metropolitan Fire Brigade Act, 28 and 29 Vict., c. 90, § 12, provides that damage occasioned by the Fire Brigade in "pulling down" buildings to put an end to a fire "shall be deemed to be damage by fire within the meaning of any policy against fire."
[5] Washburn *v.* Ins. Co., 2 Fed. Rep. 304.
[6] Hustace *v.* Phœnix Ins. Co., 175 N. Y. 292.
[7] Field *v.* City of Des Moines, 39 Ia. 575.
[8] See Star of Hope, 9 Wall. (U. S.) 203, 228.
[9] Bishop *v.* Mayor, 7 Ga. 200.